United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1909.

No. 1989.

THE CAPITAL TRACTION COMPANY, APPELLANT,

vs.

H. DIVVER.

BRIEF OF APPELLANT.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLOP,
Attorneys for Appellant.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1909.

No. 1989.

THE CAPITAL TRACTION COMPANY, APPELLANT,

vs.

H. DIVVER.

BRIEF OF APPELLANT.

Concise Statement of Facts.

The appellee, H. Divver, who was plaintiff below, filed his suit on November 20, 1908, in Justice's Court, Sub-District No. 1, against the appellant here, claiming damages resulting from personal injuries and damage to his wagon as a consequence of a collision between his wagon and a street-car of the appellant. The trial in the Justice's Court resulted in a verdict for the plaintiff for $300 and costs, from which judgment the defendant appealed to the Supreme Court of the District of Columbia, whereupon, upon issue joined, a verdict for $300 was rendered for the plaintiff, upon which verdict judgment was entered on December 11, 1908 (Rec., p. 2). From this judgment this appeal was had to this court. The only question raised by this appeal is whether the trial justice upon all the testimony in the case should have directed a verdict for the defendant. The detail testimony of

the plaintiff and of his supporting witnesses as well as the testimony introduced on behalf of the defendant will be found in the bill of exceptions (Rec., pp. 3 to 9). As it is necessary to consider this testimony at some length, it is not reviewed here.

Assignment of Error.

1. The court erred in refusing to grant the appellant's prayer (Rec., p. 9) as follows:

"The jury are instructed that upon the whole evidence their verdict must be for the defendant." But the court refused to give the said instruction to the jury; to which action of the court the defendant then and there excepted, and the court entered the said exceptions upon its minutes.

It was contended by counsel for the defendant that the foregoing instruction should have been granted for two reasons: (1) That there was no evidence from which the jury could infer negligence on the part of the defendant; and (2) because the testimony of the plaintiff himself, established his own contributory negligence as a matter of law.

Points of Fact to be Discussed.

None of the material facts bearing upon the questions of negligence and contributory negligence are in dispute in this case. It appears from the unimpeached and uncontradicted testimony in the case, principally on behalf of the plaintiff himself, and it may be said to be conceded, that the collision occurred, and the incidents leading up to it were, as follows:

On September 5, 1907, about 8.30 in the morning a certain motorman, who did not testify at the trial, he having previously died of tuberculosis, in charge of a train of the Capital Traction Company composed of two open cars, was engaged in operating said train in a south-

erly direction on Fourteenth street; that immediately prior to this time an employee of the District street cleaning department in the regular performance of his duties, had sprinkled the track and rails thereof on which the said cars ran, from R street south to a point south of Thomas Circle, which rendered the rails very slippery, and very greatly increased the difficulty of stopping the cars; that the said motorman from the corner of Fourteenth and R streets, where the sprinkling began, to the point of the collision at or near Thomas Circle had had great difficulty in stopping his car on account of the condition of the tracks; that as the train approached the north side of Thomas Circle and when about opposite the statue of Martin Luther in front of the Lutheran Church and a short distance before reaching the beginning of the first curve in the track which turns to the right, the motorman slowed down the speed of the car in the usual manner prior to entering the curve and, seeing the team driven by the plaintiff which was subsequently struck, approaching the track from the east and on the north side of Thomas Circle near the curbing which bounds the sidewalk, and while the said team was still some distance from the track sounded his gong, as it appeared to passengers on the car as a warning to the driver of the team. That at about the same time and as he was approaching the track, the plaintiff driving the team composed of two horses and a wagon heavily loaded with cement, saw the car, drew his horses up to a stop before crossing the track and then seeing the car slowing down and seeing a man coming down a flight of steps from an apartment house to the sidewalk and, assuming that the car was slowing down to take on board this man whom he took to be an intending passenger, whipped up his horses and continued to drive across the track; that the place where the man was approaching the track was not a stopping place for passengers; that the car did not stop but

entered the curve at a slow speed; that the motorman continued to put on his brake in an apparent effort to stop the car; that by reason of the slippery condition of the tracks he was unable to bring the car to a stop by the use of the brake; that the car while continuing to slide passed through and out of the first curve and thence along the piece of straight track between the first and the main curve around Thomas Circle and came into collision with the wagon at or near the rear wheel, the wagon not having gotten completely across the track; that the wagon was upset, the driver thrown off to the ground and hurt, and the wagon damaged. The front of the car passed on by the wagon, and when the car finally came to a stop the wagon was opposite the right side of the motor car about the center thereof. Expert motormen produced on behalf of the plaintiff testified that such sprinkling of the tracks as was proved in this case rendered them very bad for stopping; that it was very difficult, if not impossible sometimes, to stop a car with the brakes under such circumstances; that on a curve the dropping of sand by the motorman from the sand-box in front of the wheels would have no effect as the sand would not fall upon the rails; that a motor car could be stopped without the use of the brake by reversing the current which operates the motors; that such reversing of the current would have no effect in stopping the car unless the brakes were released and that in any event the use of the reverse current was uncertain, because unless it was properly put on it was likely to blow out the fuse and under such circumstances the car would have no current and would be practically helpless; that the tracks at and just before reaching the point of the collision are on a slight down grade; that on such a sprinkled track and on a slight down grade, it might be almost impossible to stop the car with the brake in any reasonable dis-

tance; that under ordinary circumstances and with the tracks in a good condition and on a level street, a car, traveling at the rate of four miles an hour (the rate assumed in this case) could be stopped by the application of the brake in from twenty-five to thirty feet and that by reversing the current under such circumstances it could be stopped in from ten to fifteen feet.

With respect to the first sub-division of the Assignment of Error (namely, the evidence bearing upon the question of the negligence of the motorman) it was not contended at the trial, and we presume will not be contended here, that there was any negligence on his part before the team came into a position of peril by driving on the track. It is, however, contended, that the negligence of the motorman consisted in his failure to bring the car to a stop after the team drove on the track and before coming into collision therewith. This is the doctrine of Last Clear Chance. It is conceded that the motorman properly reduced the speed of his car on approaching and entering the curve; that he was not under obligation to stop before entering the curve; that his brakes were set and that he gave warning by striking his gong. It is further shown by the testimony of the plaintiff's own witness that no additional effort to stop the car even by the use of sand until the car had cleared the first curve would have been of any avail, because such sand, if used, would not have fallen upon the rails. The only question therefore remaining, so far as the plaintiff's contention is concerned, is whether, after the car had cleared the first curve by a distance sufficient to have brought the sand-outlet back over the rail by the swinging back of the overhang of the car, there was sufficient distance left in which the car could have been stopped by the use of such means at the motorman's command, as he could reasonably be expected to avail himself of under the circumstances.

In answer to this contention we would point out that the evidence entirely fails to show even approximately, in what distance a car could be stopped on the slight down grade in question on the gummy and slippery tracks at the speed of four miles an hour either with or without the use of sand and the reverse or either of them. The testimony with respect to these matters being—

> "that under *ordinary circumstances* and with the *tracks in good condition* and on a *level street*, a car traveling at the rate of four miles an hour could be stopped by the application of the brake in from *25 to 30 feet;* that by reversing the current it could be stopped in from 10 to 15 feet; that if the tracks were *damp and gummy* it was *much more difficult to stop the car*; that for tracks in this condition brakes were not much good, but by the use of *sand* and the *reverse*, where the *track* was *straight* and of *level grade*, and where the car was going at the rate of *four miles* an hour, it could be stopped in from *25 to 30 feet;* that it was *more difficult* to stop on a *down grade;* that the point in question, . . . is a *slight down grade* . . . ; that the said sprinkling cart . . . would make a very bad condition for stopping with the brake, and that under such circumstances, on a slight down grade, *it might be almost impossible to stop the car with the brake in any reasonable distance;* that the use of the reverse current was uncertain. . . . "

It is a mere matter of arithmetic to show that this motorman could have had at the best not more than thirty-eight feet in which the car could have been reversed and sand used upon the track; the entire length of the piece of straight track between the curves was sixty-eight feet. The sand would not have fallen upon the track until the motor car was out of the curve, taking the length of this car at approximately about twenty-five feet would

reduce the distance to forty-three feet; the wagon passed across the straight track near its lower end and its width being not less than six feet would reduce the distance between the front of the car and the near side of the wagon to thirty-seven feet. Could any jury be permitted to find as a fact from such testimony, that this motorman could have brought his car to a stop within this distance either with or without the use of sand and the reverse on a slippery track and a down grade? This alone would seem to be conclusive of error.

This analysis, however, leaves entirely out of consideration most important considerations of which the trial court was bound to take notice. The law does not require in a case of this character that the motorman should use extraordinary means or extraordinary care. As between the street railroad and the public in the streets the duty to use care is reciprocal and that care is the care which an ordinarily prudent man will exercise under the circumstances. The proper, customary, and usually efficient means for stopping such cars are the brakes; other means such as the use of sand and the reverse current are unusual and extraordinary and "uncertain" and in the case of such an emergency would require the exercise of not only unusual efforts but unusual presence of mind on the part of the motorman and it has been repeatedly held that the failure to use such extraordinary or unusual means under such circumstances where the usual means have been employed can not be construed as negligence.

Heckmuller *vs.* N. Y. City Ry. Co., 104 N. Y. S., 679.

Ramsey *vs.* Cedar Rapids & M. C. Ry. Co. et al., 112 N. W., 798.

Lexington Ry. Co. *vs.* Woodward, 106 S. W., 853.

In short, there is an entire absence of proof that such means or any other means, had they been used, would

have been effective in preventing this collision. Neither could the jury be permitted to draw any unfavorable inference from the failure of the motorman to testify, it having been shown that he was dead. On the other hand, the positive testimony of disinterested witnesses whose testimony was in no wise either impeached or rebutted, was to the effect that the motorman made every effort within his power to stop the car even before the plaintiff had driven upon the track and the testimony of the plaintiff himself in this regard was:

> "I looked up again and discovered that the car had not stopped but was coming towards me and *the motorman was bending over and appeared to be fumbling with the brake.*"

Now, as to the plaintiff's contributory negligence:

What is to be said of the care exercised by the driver of a heavily loaded team,which he knows he can not hurry, who stops his team before crossing a street-car track upon seeing a car approaching and who, seeing that car slow down before entering a curve not at a regular stopping point, jumps to the conclusion that it is going to stop because he also happens to see a man coming down a flight of steps on the sidewalk, and without waiting even a moment to verify his rash conclusion whips up his heavily loaded team and pulls upon the track into a position of inextricable danger?

Is the law which requires that a man use his faculties, his sight and hearing and his "common sense as well" to learn whether the way is safe, to be reduced to a travesty by permitting that man who says he has taken these precautions to disregard them and deliberately drive into danger, taking the chances of his judgment being correct and of the other man doing more than the law requires him to do?

> Barrett *vs.* Columbia Ry. Co., 20 App. D. C., 381, 30 W. L. R., 549.

Points of Law to be Discussed.

I.

Where all reasonable men would draw the conclusion that the facts established by the evidence could not properly be held to constitute negligence, or that other facts established by the evidence could only be properly held to constitute contributory negligence, such questions should not be left to the jury.

The authorities in support of this proposition (if, indeed, any are required) will be found fully discussed and quoted in appellee's brief in the case of Barstow *vs.* Capital Traction Co., No. 1683, in this court, at p. 47, et seq., of said brief. Some of them are as follows:

In the case of Southern Pacific Co. *vs.* Pool, decided in 1895 (160 U. S., 438), Mr. Justice White, delivering the opinion of the court, said (p. 440):

> "There can be no doubt where evidence is conflicting that it is the province of the jury to determine from such evidence, the proof which constitutes negligence. *There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law.* Union Pacific Railway Co. *vs.* McDonald, 152 U. S., 262, 283."

In the case of District of Columbia *vs.* Moulton, decided in 1900 (182 U. S., 576), Mr. Justice White, delivering the opinion of the court, said (p. 579):

> "Where but one inference can reasonably be drawn from the evidence the question of negligence or no negligence is one of law for the court. Northern Pacific Railroad Co. *vs.* Freeman, 174 U. S., 379, 384; Metropolitan Railway Co. *vs.* Jackson (L. R.), 3 App. Cas., 193. It is only where the evidence is such that reasonable men may fairly differ as to the deductions to be drawn

therefrom, that the determination of the fact of negligence should be submitted to a jury. Warner *vs.* Baltimore & Ohio Railroad Co., 168 U. S., 339, 348."

Citations to other cases on this same question are as follows:

Bowditch *vs.* Boston, 101 U. S., 16.
Griggs *vs.* Houston, 104 U. S., 553.
Grand Trunk Railway Co. *vs.* Ives, 144 U. S., 408.
Spruill *vs.* Insurance Co., 120 N. C., p. 147.
Crenshaw *vs.* A. & B. Street Railway & Tr. Co., 144 N. C., 314.
Pleasants *vs.* Fant, 22 Wal., 116.
Randall *vs.* B. & O., 109 U. S., 478.

II.

With respect to pedestrians and vehicles in the streets, a motorman must exercise ordinary care in the operation of his car to avoid collisions; and the duty of such pedestrians and the drivers of vehicles is reciprocal.

The case of Unger *vs.* Forty-Second St., &c., Railroad Co., 51 N. Y., 497, illustrates this proposition. In the course of the opinion the court say:

"But the learned counsel for the appellant argues that a street railway company is bound to adopt every improvement and to use every precaution for the purpose of meeting an unforseen occurrence, and preventing injuries to travelers upon the streets as well as passengers in the cars; and he seeks to apply the same rule, as to diligence and care, which has in many cases been applied to railway companies, whose cars are drawn by steam, in the construction of their cars, with the view to the safety of passengers therein. The argument is clearly unsound. The degree of care which a person owing diligence must exercise depends upon

> the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. . . . The degree of care required in any case must have reference to the subject-matter, and must be such only as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. . . . And, hence, no more care can be required of street railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle."

In the case of Lexington Railway Co. *vs.* Woodward, 106 S. W., 853, it was held that a street-car company owes to those having a right to the common use of the streets with it only that degree of care that a person of ordinary prudence would exercise under like circumstances.

The case of Heckmuller *vs.* New York City Railway Co., 104 N. Y. Supp., 679, also illustrates this proposition. In the course of the opinion the court say:

> "The obligation resting upon the defendant was to exercise that degree of care which a person of ordinary prudence, exercising reasonable care, would use under similar circumstances. The defendant was not called upon to exercise all the care that he could exercise at the particular time. Such rule would impose the duty of extraordinary precaution, and substitute a more rigid rule of responsibility than the law requires of the defendant in the operation of its cars. In Lewis *vs.* L. I. R. R. Co., 162 N. Y., 52, 56 N. E., 548, the charge was that if the engineer of the train, which came in contact with a vehicle at a road crossing, 'omitted to do any act which might have prevented the collision,' the defendant was guilty of negligence. This was held error, for the reason that it imposed a more enlarged obligation upon the defendant than the law required. In Leonard

vs. Collins, 70 N. Y., 90, the charge was that, if the defendant could do 'anything that could have prevented the accident,' he was guilty of negligence, and such charge was held to be error.

"In Reardon *vs.* Third Ave. R. R. Co., 24 App. Div., 163, 48 N. Y. Supp., 1005, in charging upon the subject of the care required in the management of vehicles by each party, the court said:

"'They were bound to use the same degree of care, the same degree of prudence. Each was bound to look out for, and if possible prevent, any accident.'

"This charge was held to be error calling for the reversal of the judgment which had been obtained in plaintiff's favor, although the charge as made bore as heavily upon the plaintiff as upon the defendant. Such consideration, however, did not mitigate the wrong which had been done to the defendant, as it enlarged his responsibility for his acts beyond what the law required. These authorities are directly in point upon the question involved, and are decisive in showing that error was committed in the charge. The effect of this was to lead the jury to believe that it was required of the defendant to exercise all the care that could be used at the time. Such was the rule of liability upon which the case went to the jury, and, as it imposed a higher degree of care upon the defendant than the law, it was erroneous."

In the case of Lockwood *vs.* the Belle City Street Railway Co., 92 Wis., 97, the court say:

"Thus it appears and it is undisputed that the motorman saw the horse and wagon when 100 feet distant from them; that when he got within forty- or fifty feet of them he was active in doing all that he could in trying to stop the car—in throwing off the current, in attempting to apply the brake, and in attempting to apply the reverse current; and that he failed because, and only because, the brake gave way, as indicated, and the

reverse current, for the moment, failed to take effect, as indicated. There is not a particle of evidence that the giving way of the brake or the failure of the reverse current to take effect was the fault of the motorman. The jury must have concluded that the motorman had reasonable ground for apprehending danger of a collision when his car was more than 40 or 50 feet from the wagon; and yet the evidence is undisputed that had the brake worked as usual, or the reverse current had taken effect as usual, the motorman would have had no difficulty in stopping the car, at the speed it was going, in moving a distance of 30 or 40 feet. Thus it is manifest from the undisputed evidence that there was no failure of the motorman to keep a proper lookout, no failure to act when there was reasonable ground for apprehending danger, no wilful or intentional wrong or omission of duty. If he was at fault at all, it must have been some unconscious misjudgment, mistake, or mismove in manipulating the brake or in applying the reverse current, not disclosed by the evidence. Such misjudgment, mismove, or mistake (assuming it to have been made) was certainly not more culpable than, if as culpable as, the negligence of the plaintiff or his father, who was driving the horse.

"That there can be no recovery under such circumstances has been held by this court in cases too numerous to mention."

In the case of Schilling *vs.* C., M. & St. P. Railway Co., 71 Wis., 255, it was held that where by the conduct of both parties in the transaction they are guilty of negligence in the same degree, or are equally culpable, there can bo no recovery. The principle upon which that case was decided has been sanctioned by numerous cases since, as well as before.

The case of Zurfluh *vs.* People's Railway Co., 46 Missouri App., 636, a case which did not warrant the submission of the cause to the jury, holds:

> "The acts of negligence stated in the petition were, in substance, that the gripman on the defendant's car failed to give a sufficient warning of the approach of the car, and that he did not use that care which the law requires to avoid the collision after he discovered, or by the use of ordinary vigilance might have discovered, the danger to which the plaintiff was exposed. When the evidence was all in, the plaintiff seems, as shown by his instructions, to have placed his right of recovery solely on the ground that the defendant's servants might have avoided the injury, if they had made proper efforts to stop the car after they discovered, or by the use of ordinary diligence might have discovered, his perilous position. . . .
>
> "It is fairly inferable from the plaintiff's own testimony that he was careless in his approach to the defendant's tracks, and in attempting to cross them in the manner in which he did. And it may also be said that his evidence failed to show that the defendant's servants in charge of the car failed to give the usual warning in approaching a crossing, or when danger to persons on the street was to be apprehended. The plaintiff admitted that he could have seen the car if he had only looked, as soon as he reached Mississippi avenue; that, when his horses reached the easterly track, he heard the bell on the car; that then, for the first time he looked and saw the car approaching from the north, about one-half block away; that he did not stop because he thought he had sufficient time to get across ahead of the car; that he attempted to do so, but, before he reached the west track on which the car was approaching, he thought that there was danger of a collision, and that he had better turn south, and did so; that, when he made this turn he saw another car approaching from the west about one block distant, and this caused him

to again attempt to cross the west track, and that in doing so the car struck one of the hind wheels of the wagon. Under this condition of the proof the plaintiff's counsel, as we have indicated, seem to have abandoned the idea that their client was without fault, or that the defendant was negligent in the first instance. They properly recognized that it was the duty of the plaintiff to take some thought or care for his own safety, while traveling along the streets of a populous city. Hence the only possible theory upon which a recovery could be had, was a failure on the part of the defendant's servants to use proper care and efforts to avoid injury to the plaintiff after they discovered, or by the exercise of ordinary vigilance, might have discovered, the danger. . . .

"If the plaintiff had gone across in the first instance, the car could easily have been stopped before any harm could have been done, because the plaintiff himself testified that, at the time he first saw the car, it was far enough away to have been stopped twice. Just how far that was he does not say. The conclusion is a fair one that the plaintiff was not in peril until he attempted to cross the second time. . . .

"If the testimony of the gripman is to be credited, it was impossible to avod the accident. He testified, in substance, that he saw the plaintiff approaching the crossing; that he sounded the gong and placed the car under control until he could determine whether the plaintiff intended to cross in front of the car or not; that he saw the plaintiff turn his horses' heads to the south along the easterly track, and that, acting under the belief that the plaintiff did not intend to make the crossing, he applied the grip to the cable and entered the curve at full speed; that, when he was eighteen or twenty feet from the plaintiff, the latter suddenly and without any previous warning attempted to cross in front of the car, and that he used every means to stop the car before the collision, but that it was impossible to do so under the circumstances."

In the case of Coughtry *vs.* Willamette Street Railway Co., 21 Oregon, 245, the court say:

> "The gist of this action is negligence; and in order to enable the plaintiff to recover, he must prove by a preponderance of the evidence that the defendant violated some duty which it owed to the plaintiff; that is, that it did some act without due care which it ought not to have done, or that it omitted to do some act which it ought to have performed, and that such act or omission contributed to the injury of which the plaintiff complains; and in addition to this that the plaintiff was guilty of no act which contributed to the injury.
>
> . . . . . .
>
> "Whether the motor could have been stopped after it was seen by the engineer that the horses were on the track, does not appear. There is not a particle of evidence on the subject. As this record stands there is no evidence of any negligence on the part of the defendant that could justify a recovery. In addition to this, it is difficult under the circumstances to resist the conclusion that the plaintiff was negligent in handling and caring for his team at the time of the injury, and that this negligence directly contributed to the injury.
>
> "For these reasons, the court below erred in refusing the defendant's motion for a nonsuit, and the judgment appealed from must be reversed, with directions to sustain the defendant's motion for a nonsuit."

Other authorities on this proposition are cited and discussed in a compilation entitled "Legal Propositions Concerning Collisions between the Cars of the Capital Traction Company and Pedestrians or Vehicles," at pp. 26-56 thereof, which compilation is herewith respectfully submitted for reference.

> See also Liutz *vs.* Denver City Tramway Co., 95 Pacific, 600.
>
> Riedel *vs.* Wheeling Traction Co., 61 Southeastern, 821.

III.

The proper and timely use by the motorman of the means at his command which are usually efficient to stop the car constitutes "ordinary care;" and under the natural stress of circumstances incident to a threatened collision, if he does not use all or other means which might have proved more efficient, he is not chargeable with negligence.

In the case of Ramsey *vs.* Cedar Rapids and M. C. Railway Co. et al., 112 N. W., 798, 135 Iowa, 329, the court, in the course of the opinion, say:

> "It will be remembered that negligence was not charged as of the speed at which the car was being operated, nor in respect of the equipment of the car; and it is to be said that the evidence shows conclusively that the driver of the hack saw the car coming when he started to drive across the track. He testified that some persons were standing by the track, and that he supposed the car would stop and take them on, thus giving him time to make the crossing. The motorman who was in charge of the car testified that he saw the hack when it started to cross the street. From this it becomes apparent that the negligence of defendant, if any there was, was in failing to make a timely stop of the car. In respect of what was done to effect a stop, the motorman testified that, as the most effective method, he used the emergency stop—a stop brought about by a reversal of the electric current—instead of the brake ordinarily used. And this evidence stands in the record uncontradicted. Now, it is the rule of all our cases, and we need not cite them, that the test of negligence is a failure to use reasonable and ordinary care in view of the known conditions existing in the particular case. . . . The motorman was called upon to act in an emergency, and, after all, the question is: Did he act under the circumstances as a reasonably prudent person?"

The case of Lexington Railway Co. *vs.* Woodward, 106 Southwestern, 853, also illustrates the point. In that case it was held:

> "The proof shows that there were two ways of stopping the speed of the car, one by reversing the current, and the other by applying the brake. Both of these means were at his command, and the jury may have concluded that it was negligence on his part to fail to use both means, whereas the law only requires of him that he use ordinary care in the exercise of the means at his command to avoid the danger after it is discovered, or could, by the exercise of ordinary care, have been discovered by him. The company and its employees owe to passengers the highest degree of care for their safety and to avoid injuring them; but as to trespassers, licensees, and others having a right to the common use of the streets with the company, they are required to exercise only that degree of care that a person of ordinary prudence and habits would exercise under like or similar circumstances. The jury may have concluded that the motorman did not use the most effective means at his command, or that he did not use all and every means at his command for stopping the car. They should not have been left to speculate upon this point, but should have been told that he was only required to take such steps toward stopping the car as a man of ordinary care and prudence would have taken under the same or similar circumstances. . . . In our judgment, this case must be reversed because of the error in the instructions above cited."

In the case of Gabriel *vs.* Metropolitan Street Railway Co., 109 Southwestern, 1042 (Mo., 1908), the court say:

> "The plaintiff's counsel in the brief and argument have utterly failed to point out any evidence whatever to indicate that the defendant by any degree of diligence could have avoided strik-

ing the child. . . . The mere fact that a person is on the street with the evident purpose of crossing it while a car is approaching is no evidence in itself that he intends to place himself in a position of peril. Reno *vs.* Railway Co., 180 Missouri, 469, 79 Southwestern, 464."

In the case of Citizens' Passenger Railway Co. *vs.* Thomas, 19 Atlantic, 286, 132 Pa. St., 504, the court say:

"The only negligent act complained of, therefore, is that the conductor did not stop the car before the collision occurred. . . . Nor is there any evidence that he failed to apply the brakes promptly and energetically when the exigency arose. No witness has suggested that the driver did anything which he should not have done, or that he failed to do anything which he could have done, to avert the accident. On the contrary, the proof on both sides is consistent, clear, and positive that the brakes were applied at once. Mr. Berndt says that he heard the clink of the brake, and noticed that the driver put on all his force. Whatever may have been the distance between the car and the phaeton when Mrs. Thomas undertook to cross the track (and this is variously stated by the witnesses), it is plain that notwithstanding the efforts of the driver to stop the car the collision occurred. Upon this state of facts we are of opinion that the court erred in submitting the question of the defendant's negligence to the jury.

. . . . . .

"It (the car) was running at the usual rate of four or five miles an hour, upon a descending grade, and could not be stopped as readily or as quickly as her horse, which was moving at a slow walk. . . . The car she says was thirty feet distant, and she had reason to think there was no risk, and that she had time to cross. She would seem to have taken the chances, and assumed the risk. Assuming that it was the duty of the driver,

in order to prevent a collision, to use ordinary and reasonable efforts to stop the car, the company, upon the facts of this case, was, we think, only responsible, if responsible, at all, for wanton neglect, of which there is not the slightest proof. The plaintiff was without doubt, according to the testimony of her own witnesses, guilty of negligence in driving her phaeton right in front of a moving car. She had a right to drive on the public streets, and at any point over the company's tracks, for they were laid in the street; but in doing so she was held to the exercise of ordinary care. The company, also, had a right to run their cars upon their tracks longitudinally with the street at such reasonable rate of speed as was consistent with the safety of the traveling public. Indeed, in a certain sense, the company has precedence over the ordinary travel, for their cars, being confined to the track, other vehicles must of necessity turn out and give the cars opportunity to pass. . . .

"If instead of a street-car this had been a train of railroad cars, running at the usual rate of speed, and approaching a road crossing, with the customary warning and signals, it would certainly not be pretended that this lady would have been justified in going upon the track with her phaeton, in case of injury, if she could afterwards show that the train might somehow have been stopped in time to prevent the injury. This would dispense with the whole doctrine of contributory negligence, as declared in the decisions of this court. If the plaintiff's negligence contributed to the injury, under the facts of this case, she can not recover. This is too well established in Pennsylvania to admit of any question, or to require the citation of authorities..

"In establishing the negligence of the company the burden of proof is upon the plaintiff, and we think she has failed in establishing a state of facts from which negligence could be fairly inferred; and, although she is not required to prove the absence of contributory negligence in the first

instance, it is incumbent upon her to show a case clear of contributory negligence on her part, and this she has not done. Her own testimony, taken with that of her own witnesses, clearly convicts her of negligence, which was the principal, if not the sole, cause of the injury.

"The judgment is reversed."

See, also, Louisville Railway Co. *vs.* Boutellier, 110 Southwestern, 357 (Ky., 1908), in which the question of "ordinary care" is gone into at some length and very thoroughly discussed.

See, also, Spiking *vs.* Consolidated Railway and Power Co., 93 Pacific, 938 (Utah, 1908), in which it is held that a street railway company is only required to adopt methods, machinery, and appliances in accordance with the ordinary usage of business.

Also, Dallas Con. St. Ry. *vs.* Conn, 100 S. W., 1019.

IV.

The doctrine of "last clear chance" does not apply where the negligence of both plaintiff and defendant is concurrent and continuous up to the happening of the accident.

Lewis *vs.* The B. & O. Railroad Co., 38 Maryland, 588.

Lockwood *vs.* Belle City Street Railway Co., 92 Wis., 97.

Other authorities on this proposition are cited and discussed in the compilation above referred to, entitled "Legal Propositions Concerning Collisions Between the Cars of the Capital Traction Company and Pedestrians or Vehicles," at pp. 57–89 thereof, which compilation is

herewith respectfully submitted for reference. A few of them are as follows:

In the case of The Maryland Central Railroad Co. *vs.* Neubeur, 62 Md., 391–398, Mr. Chief Justice Alvey says:

> "The general principle is, that where both parties by their negligence directly contribute to the production of the accident, neither has a right to recover of the other for injuries sustained thereby. But there are exceptions to this general rule; and in cases like the present, the exception is, that if the defendant, or those acting for it, had become aware of the perilous situation of the plaintiff, though that peril had been incurred by the negligent or even reckless conduct of the plaintiff, yet the defendant or its agents would be bound to use all reasonable diligence to avoid the accident. But in order that this qualification of or exception to the general rule may be successfully invoked by the plaintiff, he must show knowledge on the part of the defendant, or its agents, of the peril in which he, the plaintiff, was placed, and that there was time after such knowledge, within which to make the effort to save him from the impending danger."

Again, in the case of Northern Central Railroad Co. *vs.* The State, use of Geis, 31 Md., 357, Chief Justice Alvey, delivering the opinion of the court, says (p. 366):

> "But where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled, and are regarded as equally proximate to the effect produced, and, therefore, not susceptible of apportionment. And if be true that the deceased was guilty of negligence, it must, from the nature of the accident, have been of this latter character."

In the case of McNab *vs.* The United Railways Co., 94 Md., 719, the court say (p. 728):

> "When the motorman saw—*and we may presume that he did see, because he could have seen*—that Mrs. McNab was in a place of safety,

> he was under no obligation to assume that she would deliberately leave that place and drive into the jaws of danger. As said by this court in Neubeur's case: 'But it was not the duty of those in charge of the train to anticipate the conduct of the plaintiff, and because they saw him approach the crossing to conclude that he would attempt to cross in advance of the train. On the contrary, they were, or would have been, fully justified in supposing that he would not venture to cross until after the passage of the train.' Md. Cent. R. R. Co. *vs.* Neubeur, 62 Md., 401. There is not the faintest gleam of evidence to show that the motorman could have stopped the car or checked its speed so as to avoid the collision after Mrs. McNab drove upon the track on which the car was moving. The doctrine is only applicable when the company's negligence in not avoiding the consequences of the plaintiff's negligence is the *last* negligent act. It can never be invoked when the plaintiff's own act is the *final* negligent act."

In the case of Boston & Maine R. R. Co. *vs.* McDuffey, 25 C. C. A., 247, this same doctrine was invoked; but the court say, at page 255:

> "But such negligence on his (the engineer's) part would not deprive the defendant of whatever defense it might have arising from McDuffey's own negligence. To lose the benefit of such defense it must appear that a defendant has been guilty of some negligence subsequent to the time when he knew or ought to have known that the other's negligence *had created a position of peril.* Coasting Co. *vs.* Tolson, 139 U. S., 557; Railroad Co. *vs.* Ives, 144 U. S., 408. 'It is only when the negligence of one party is subsequent to that of the other that the rule can be invoked. When the negligence of the two parties is *concurrent at the time of the injury,* it makes no difference that one discovered the negligence of the other before the catastrophe, but too late to prevent it.' 4 Am. & Eng. Enc. Law, p. 30."

Again, in the case of Gilbert *vs.* Erie Railroad Co., 38 C. C. A., 408, Judge Day, speaking for the court (Lurton Day, and Thompson), says:

> "As we understand the rule to be deduced from these authorities, it amounts to this: That where the plaintiff, by his own negligence, has placed himself in a dangerous position, where injury is likely to result, the defendant, with knowledge or such notice as is equivalent thereto, of the plaintiff's danger, is bound to use reasonable care and diligence to avoid injuring the plaintiff; and where, by the exercise of such care he could do so, (he) fails to avoid the injury, this negligence introduces a new element into the case and renders the defendant liable, because such negligence becomes the direct and proximate cause of the injury. *We do not think the principle settled in these cases applies to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant.*"

In the case of Western Union Telegraph Co. *vs.* Baker, 140 Fed. Rep., 316, the court say:

> "Moreover, the question in cases of alleged contributory negligence is not whether the negligence of the plaintiff or that of the defendant was the more proximate cause of the injury, but it is whether or not the negligence of the plaintiff directly contributed to it. One whose negligence directly contributed to his injury can not recover damages of *another whose negligence concurred to cause it*, even though the carelessness of the latter was the more proximate cause of it."

And see, also,

Everett *vs.* Elec. Ry. Co., 115 Cal., 115.

Robards *vs.* Ind. St. Ry. Co., 32 Ind. App., 297.

It may fairly be said that the foregoing discussion and citation of authorities establish the following proposition:

When a plaintiff is wrongfully or negligently on the

tracks of a railroad in a position of peril, the duty of the company to use due care to avoid injuring him arises at the moment the servants of the company see and become aware of his peril. Here three facts must necessarily co-exist:

(1) The company's servants must have knowledge of his peril.

(2) They must have that knowledge in time to avoid an injury; and,

(3) They must fail to exert proper care to avoid the injury after acquiring knowledge of the peril.

In the case at bar, all that the plaintiff had to do in order to avoid injury was to remain where he stopped in a place of safety beside the track.

This doctrine is also discussed in appellee's brief hereinbefore referred to in the case of Barstow *v.* Capital Traction Co., No. 1683, in this court, at pp. 154 *et seq.* thereof.

V.

The plaintiff was guilty of contributory negligence which was the proximate cause of the collision.

Zurfluh *v.* People's Railway Co., 46 Mo. App., 637.
Denver City Tramway Co. *v.* Cobb, 164 F., 41.

It is respectfully submitted that upon the authority of the foregoing propositions of fact and of law, the ruling of the learned trial justice should be reversed, and the cause remanded for a new trial.

It affords us pleasure to say that in the preparation of this brief we have availed ourselves of work done by Mr. Edwin Allan Swingle in relation to the questions involved.

Respectfully submitted.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLOP,
Attorneys for Appellant.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1909

No. 1989

THE CAPITAL TRACTION COMPANY, APPELLANT,

vs.

H. DIVVER

BRIEF FOR APPELLEE

Appellee, when driving a large, heavily loaded two-horse wagon west across appellant's track at the northwest corner of Thomas Circle, was run into by one of appellant's southbound Fourteenth Street cars, thrown from his wagon and badly injured.

Two tribunals have already determined appellee's right to recover for this.

Appellant's southbound track closely skirts the sidewalk encircling Thomas Circle from its northwest corner. (R. 4.) North from this northwest corner, which is where appellee was hurt, and distant therefrom 169 feet, there is a flight of stone steps leading from Massachusetts Avenue Terrace to the sidewalk. (R. 6.) From a point opposite this flight of stone steps appellant's track south is straight for 30 feet (R. 6), then comes the smaller curve, after which there is the further straightaway piece of track, 68 feet in length,

followed by the second and larger curve. (R. 6.) It was at the south end of this 68 feet of straight track which separated these two curves that the accident happened. (R. 4, 6, 8.)

A sprinkling cart had wetted appellant's tracks along Fourteenth Street from U Street down past Thomas Circle (R. 8, 7), making them very slippery, and the motorman had experienced considerable trouble in stopping his car all the way coming down Fourteenth Street in consequence of this slippery condition of the track. (R. 7.)

Appellee, before crossing appellant's track, looked north up Fourteenth Street, and saw a car which had just left N Street, one block north of the Circle, approaching at a rapid rate of speed. He pulled up his horses three or four feet on the east side of the track to allow the car to pass by. On seeing the car slow down, however, as if to stop for a man who had walked down the terrace steps there and across the sidewalk and street to the car track, apparently to board the oncoming car, he concluded this was a regular stopping place for appellant's southbound cars, and started across the track quite slowly on account of the heavy load of cement carried. After the horses had gone upon the track the man with appellee shouted out that the car was coming. Appellee then whipped his horses up in an unsuccessful endeavor to get across, for his wagon was struck on the rear half of the right rear wheel, and he was thrown out and badly hurt. (R. 4, 7.)

Appellant's car was going slow,—not more than four miles an hour,—for the company's rules required that all cars should not exceed this rate of speed when entering or leaving curves (R. 4, 5.)

The motorman, who was not in uniform, only attempted to avoid the collision by the use of the brake. (R. 4, 7, 9.)

He did not attempt to either sand the track or reverse the controller. (R. 4, 5, 6, 7, 9.)

ARGUMENT

A single question is here presented:

Already twice determined in appellee's favor, it now comes before this Court for final decision.

Did the motorman exercise reasonable care in his endeavor to prevent running into appellee's wagon, after seeing it driven upon appellant's track?

A question of fact, 'twas for the jury under proper instructions, and the jury rightly determined it.

Their verdict should have been conclusive.

Ry. *vs.* Ives, 144 U. S., 408, 428, 429.

No matter what error of judgment led appellee upon that track—no matter whether he had a right to think that this man who had come down the terrace steps, and who stood apparently ready to board the car at least 169 feet north from where appellee endeavored to cross, was at a regular stopping place for appellant's southbound cars or not—after appellee had driven his team upon the track, appellant's motorman could easily have stopped his car by sanding the track and reversing his controller.

He did neither; he attempted neither.

No one knew better than he that the brake would not hold the car on the slippery track prevailing at the time; for had he not experienced great difficulty in stopping his car all the way down Fourteenth Street because of this very condition?

He knew, or should have known, how to sand his track in the 30-foot of straightaway that first intervened when appellee started across the track; and afterwards, in the 68 feet of straightaway that came between the two curves, so as to properly counteract the slippery condition of the track. He knew, or should have known, how to properly reverse his controller, so as to have avoided the collision; for did he not know that his car, by proper manipulation and management, could have been stopped within 25 or 30 feet after he had sanded his track and reversed his controller?

This was no time of emergency; no time of sudden danger.

Ample time and opportunity was afforded him in which to have stopped his car after he had seen appellee drive on the track; for had not notice of the inadequacy of the brake with this slippery track been given him long before?

It is no excuse that he was a new motorman, or that he put on the brake in his endeavor to stop the car, instead of using sand to counteract the slippery condition of the track, and of reversing his controller to prevent the collision.

The law expected no vain thing of him; asked only the use of a fair amount of skill and judgment; demanded only the reasonable exercise of care—care commensurate with conditions prevailing at the time.

Nothing more was required of him; nothing less would suffice.

Cook *vs.* Ry., 80 Md., 551.
Ry. *vs.* Ives, *supra,* 408, 417.

After appellee had started to cross appellant's track with his team he could not get back or turn; the only thing he could do was to get across as quickly as possible. This he tried his best to do.

Then it was that the failure of the motorman to control and stop his car supervened as appellant's negligence, and became the direct, proximate and efficient cause of appellee's hurt.

For this appellee should recover.

Inland & Seaboard Coasting Co. *vs.* Tolson, 139 U. S., 551, 558, 559.
Hawley *vs.* Columbia R. Co., 25 D. C. App., 1, 5.

It is respectfully submitted, therefore, that the judgment appealed from is correct, and should be affirmed.

LEONARD J. MATHER,
Attorney for Appellee.